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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CARL HOLDER,

Petitioner,

v.

STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT

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QUESTIONS PRESENTED

1. Whether § 12-6(a)(3) of the Illinois Criminal Code which regulates speech is overbroad or vague and in conflict with the first amendment.

2. Whether the felony prosecution of petitioner under § 12-6(a)(3) of the Illinois Criminal Code for words spoken to an employer during a labor dispute violates the first amendment or conflicts with the national labor policy enacted pursuant to the supremacy clause.

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PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT

Defendant-appellee in the court below petitions for a writ of certiorari to review the judgment in this case of the Appellate Court of Illinois, Second District.

OPINIONS BELOW

The November 3, 1983 opinion of the appellate court (App.A, *infra*, 1a-11a) is officially reported at 119 Ill.App.3d 366, 456 NE2d 628. The prior opinion of the Supreme Court of Illinois (App.C, *infra*, 1c-11c) is officially reported at 96 Ill2d 444, 451 NE2d 831 (1983). The appellate court's first opinion in the case (App.D, *infra*, 1d-6d) is officially reported at 103 Ill.App.3d 353, 431 NE2d 427 (1982).

JURISDICTION

The order of the Supreme Court of Illinois denying petitioner leave to appeal the appellate court's November 3, 1983 decision (App.B, *infra*, 1b) was entered on January 31, 1984 and is officially reported at 458 NE2d 1305. The jurisdiction of this Court is invoked under 28 USC § 1257(3).

STATUTES INVOLVED

The Illinois Intimidation Statute, ch.38, ¶ 12-6, Ill. Rev. Stat. 1979, provides:

> 12-6. Intimidation.
>
> § 12-6. Intimidation. (a) A person commits intimidation when, with intent to cause another to perform or to omit the performance of any act, he communicates to another a threat to perform without lawful authority any of the following acts:
>
> (1) Inflict physical harm on the person threatened or any other person or on property; or
>
> (2) Subject any person to physical confinement or restraint; or
>
> (3) Commit any criminal offense; or
>
> (4) Accuse any person of an offense; or

(5) Expose any person to hatred, contempt or ridicule; or

(6) Take action as a public official against anyone or anything, or withhold official action, or cause such action or withholding; or

(7) Bring about or continue a strike, boycott or other collective action.

(b) Sentence.

Intimidation is a Class 3 felony.

The Constitution of the United States provides as relevant:

Article VI.

* * *

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

* * *

Amendment [I.]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT

I.

SUMMARY OF THE CASE.

Petitioner Carl Holder, a union business representative, and four truck drivers were charged in an information with felony conspiracy, intimidation and criminal damage to property. A jury in the circuit court of Winnebago County, Illinois acquitted the drivers of all charges. Holder was convicted only of intimidation as defined in § 12-6(a)(3) of the Illinois Criminal Code for telling the drivers' employer, during the course of a labor dispute, that he represents a majority of the employer's employees, that the ready-mix trucks driven by the drivers had just left the employer's premises and were sitting down the road, and that the drums of the trucks aren't turning until the Employer signs the collective bargaining contract.

A panel of the Appellate Court of Illinois, Second District, unanimously reversed Holder's conviction holding § 12-6(a)(3) to be facially overbroad and violative of the first amendment to the federal constitution. The appellate court therefore did not reach other arguments asserted by Holder.

The Supreme Court of Illinois, with two dissents, reversed based upon its interpretation and application of decisions of this Court. It remanded the case to the appellate court with directions to consider Holder's remaining arguments.

On remand the appellate court affirmed Holder's conviction. In doing so the court rejected arguments that the statute as applied to Holder violated the first amendment and conflicted with federal labor law enacted by Congress under authority granted by the supremacy clause of the federal constitution.[1]

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[1] The appellate court also rejected Holder's state law contentions (App.A 6a-9a).

The Supreme Court of Illinois denied Holder's petition for leave to appeal the appellate court's decision.

II.

FACTS LEADING TO THE CRIMINAL PROCEEDINGS.

In 1979[2] Rockford Redi-Mix Co., Inc., a corporation (the Employer), was located in Rockford, Illinois, engaged in the business of delivering liquified cement by truck to local construction and commercial sites, and an employer engaged in an industry affecting commerce as defined in the National Labor Relations Act. Duane Countryman was president and his son, Curtis L. ("Curt"), was general manager (R.470-472, 765).

Four truck drivers employed by the Employer (the employees or the drivers) became defendants in this case. Petitioner Carl Holder was a business representative for Teamsters Local 325 (the Union), a labor organization as defined in the National Labor Relations Act (R.765). His duties consisted of representing the Union's members concerning grievances, negotiating collective bargaining agreements, and organizing.

The employees were dissatisfied with the Employer's wages and working conditions and in some instances responses to the employees' requests for adjustments (R.684-689, 843-846, 869, 885). At the behest of the other employees, a driver contacted Holder to "investigate the possibilities of [the employees] joining the union" (R.690, 692).

In June Holder and the driver met at a restaurant (R.693-694). Asked how the drivers could organize and secure a contract from the Employer, Holder answered that there were two ways: There was the "long route" where the drivers could petition the National Labor Relations Board for a representa-

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[2] All dates are in 1979 unless otherwise noted. The essential facts are uncontroverted and most appear in the opinions of the courts below. References to the transcript of proceedings in the trial court are (R. . . .) and to the record on appeal are (RC. . . .).

tion election; a process which could extend to three or more months. The driver expressed concern that the length of the labor board proceedings would result in the Employer firing the employees before the election was conducted. Holder said that the drivers could not be fired for union activities but that the Employer could fire them for other reasons or hire additional employees to dilute their votes in the representation election. The alternative or "short route" was, according to Holder, for the employees, who constituted a majority of the Employer's workers, to sign cards authorizing the Union to act as the workers' collective bargaining representative. With the cards in hand Holder could go to the Employer, advise him that the Union represented a majority of the workers, and "demand recognition to negotiate for a contract, and/or negotiations. If not, we could go on strike." The driver said that he would talk to the other employees and contact Holder (R.694-696).

After hearing a report from the driver of his conversation with Holder, the employees arranged a meeting in June with Holder at a driver's house (R.696-697). At this meeting Holder passed around and the employees reviewed the Union's standard ready-mix collective bargaining agreement. The drivers then asked Holder to explain how they could secure Union representation and a contract. Holder repeated about using the National Labor Relations Board (R.698-699, 770-772). "[E]verybody was concerned about ... losing their jobs" (R.700). Holder closed the meeting by suggesting, and the employees agreed, to try to resolve their grievances directly with the Employer (R.701, 772-773, 843, 869-870, 887). When the employees were unable to satisfactorily resolve their grievances with the Employer, a driver contacted Holder for another meeting (R.703-708, 711).

In the evening of July 24 Holder met with the employees at a driver's house (R.712). The employees told Holder of their failures in obtaining redress of their grievance directly with the Employer and asked Holder to explain again the procedures for

the employees to obtain Union representation and a contract. Holder repeated the National Labor Relations Board procedures and in great detail the "short route" (R.713-714, 775, 846-847, 870-871, 891-893). Outside of Holder's presence the drivers chose "the shortest route to go to join the union, and have Carl [Holder] present a proposal to [the Employer]" (R.714-715, 775-776). The employees then signed Union authorization cards (R.909-914). After being told of the employees' decision, Holder suggested that the drivers accompanying him to present the cards and contract to the Employer, but the drivers demurred in favor of Holder representing them with the Employer (R.716-718).

The meeting then turned to the mechanics of obtaining from the Employer recognition of the Union and a contract for the employees. The drivers told Holder that the next morning they were to deliver concrete to the Kirkland job site in DeKalb County. It was agreed that the employees would leave the Employer's plant as scheduled, proceed directly to Genoa Road which was on the way to the job site, and there await further developments. It was also agreed that Holder would be parked near the plant; that when the last truck left the plant Holder would enter the office; that on the employees' behalf Holder would demand that the Employer recognize the Union and sign the Union's standard ready-mix contract; and that Holder would tell the Employer that if the demands were not met "you got a strike on your hands" (R.751). The employees hoped that Holder's unannounced appearance and threat of a strike with the trucks full of cement and scheduled for a pour at the Kirkland job site would be added "leverage" to have the Employer recognize the union and sign the standard contract (R.716-722, 749-750, 751, 753-754, 776-778, 798). A code was devised to inform the employees that "we had a contract" (R.719).

On July 25, at approximately 7:45 a.m. and after the employees had left the plant, Holder and Russ Olson, the

Union's secretary-treasurer, entered the Employer's office where Curt Countryman was alone. According to Countryman Holder "said that he was from the Teamsters Union Local 325, he represented the majority of my employees, they had signed a card, and that the trucks that had just left are sitting down the road, and the drums aren't turning till I signed a contract. And he laid a contract, I assume, on my desk" (R.487-488). Holder's version of the conversation did not include the statement concerning the trucks or drums (R.780-781). However, both Countryman and Holder agreed that Countryman then said that he would have to read the contract; poured himself a cup of coffee and offered coffee to the Union representatives which was politely declined; "thumbed through the pages, looking at it"; briefly discussed with Holder Article 1 of the contract; and "looked at the booklet a little more and said I couldn't sign it." Countryman said that Holder and Olson then turned around and walked out of the office (R.488-490, 515-517). Holder testified that he "said, okay, sir, you've got a strike on your hands" (R.781).

Holder and Olson left the Employer's office and joined the employees who were parked off Genoa Road and continuing to agitate the cement. Holder recounted the meeting with the Employer. After a discussion between a driver and Countryman on the Employer's radio and Holder's unsuccessful attempt to have a business associate of the Employer persuade Countryman to sign the contract, Holder advised the employees that the Employer would not sign the contract (R.731-732, 735). The employees and Holder agreed that they would now proceed to the job site and that the employees would perform their duties as dispatched.

With Holder and Olson following in a Union car, the employees drove their trucks to the Kirkland job site, arriving, according to Curt Countryman, at about 10:55 a.m. Finding no one present at the job site and unable to raise the Employer by CB radio, a driver called in "10-23" which meant that the caller

was at the job site. The employees for the first time shut down the trucks, left the keys in the trucks' ignitions, and drove with Holder and Olson to the Union hall (R.497, 737-743, 791-794, 858-864, 876-877, 898-903).

Jim Prunty, an associate of Duane Countryman, testified that he arrived at the job site sometime after the employees had left and found the cement hardened in the trucks' drums (R.574). Curt Countryman said that the Employer had to replace one drum and jackhammer the others to remove the hardened cement (R.504-506). Defense witnesses testified that the cement could not have hardened in that time (R.649, 651-654, 657-659), and that Prunty could not have felt the hardened cement in the drum of one truck as Prunty had described (R.670-671).

III.

THE PROCEEDINGS IN THE TRIAL COURT.

Holder and the employees were charged in an amended seven count information with felonies of conspiracy, intimidation and criminal damage to property (RC.17-20). Count I of the information alleged that Holder's July 25 conversation with Curt Countryman in the Employer's office was the result of a conspiracy among Holder and the employees to commit the offense of intimidation; i.e., to communicate a threat to the Employer to criminally damage the four ready-mix trucks driven by the employees "with the intent to cause Curtis L. Countryman to perform the act of signing an employment contract" (RC.17). Counts II and III charged that that conversation constituted intimidation as proscribed by § 12-6(a)(3) and (7), respectively, of the Illinois Criminal Code (RC.17-18). Counts IV through VII charged Holder and the employees with criminal damage to property (RC.18-20) "by knowingly allowing concrete mix to harden within the drum of each of the respective trucks" (RC.29).

At a preliminary hearing the circuit court "found no probable cause in regards [*sic*] to [count III] allegations to [*sic*] intimidation with the threat of bringing about a strike or collective action without lawful authority, my theory being there may be lawful authority to strike in this case" (Rep. of Aug. 13, 1979 Proceedings at 102).

The defendants filed a motion to dismiss the information claiming, as relevant here, a conflict with federal labor laws enacted under the authority of the supremacy clause of the federal constitution.[3] The trial court overruled the motion (R.33) and the defendants put on their case.

After motions for a directed verdict (RC.90-93) were denied (R.646, 930), the cases went to the jury with sixty alternate verdicts. The jury exonerated the employees. Holder was convicted and judgment entered only on the charge of intimidation (count II) (RC.220).

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[3] The motion to dismiss the information (RC.30-31) stated:

* * *

2. That the facts disclosed by the two principal complaining witnesses of the PEOPLE in said proceeding, together with the Bill of Particulars filed herein, disclose that the underlying facts upon which the criminal charges are based involve exclusively various acts of work stoppage activity which is protected and regulated pursuant to the provisions of the National Labor Relations Act of 1947 as amended, 29 U.S.C., Sections 151 et seq. and the National Labor Management Reporting and Disclosure Procedure [*sic*] Act, 29 U.S.C., Sections 401 et seq. and accordingly, any criminal prosecution seeking to punish or otherwise regulate such protected activity under these circumstances is preempted pursuant to those authorities, and any further prosecution of the action in derogation of the federal jurisdiction herein, is violative of Article VI of the United States Constitution, the supremacy clause, and further would deny the Defendants herein due process of law guaranteed them pursuant to Amendments V and XIV of the United States Constitution, and the Constitution of the State of Illinois.

Holder filed motions in arrest of judgment and for judgment n.o.v. or for a new trial (RC.182-183, 185-190). In a supplemental motion for judgment notwithstanding the verdict, Holder asserted the facial unconstitutionality of § 12-6(a)(3) for vagueness and overbreadth.[4] In arguing the motions, Holder's attorney specifically asserted the applicability to this case of the federal district court's decision in *Landry v Daley,* 280 F.Supp. 938 (ND IL 1968), *revs'd on other grounds sub nom. Boyle v Landry,* 401 US 77 (1971), that § 12-6(a)(3) is unconstitutionally overbroad.[5] The trial court rejected Holder's

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[4] The supplemental motion for judgment notwithstanding the verdict (RC.182-183) stated as relevant:

> 1. That the charge in the Information as contained in Count II, of which the Defendant, CARL HOLDER, was convicted, alleges that he, "with the intent to cause another to perform an act, communicated to Curtis L. Countryman, of Rockford Redi-Mix Company, located at 181 Morgan Street, Rockford, Illinois, a threat to commit without lawful authority the criminal offense of criminal damage to property in violation of paragraph 12-6(3), Chapter 38, Illinois Revised Statutes."
>
> 2. That the statute, Chapter 38, Illinois Revised Statutes (1977), Section 12-6, from which the charge was derived, is unconstitutionally void for vagueness, in that the specific intent defined in the statute, is virtually unlimited "to cause another to perform . . . any act"; and further, does not limit the performance of any act to that which is against the will of the parties subject to such intention. Further, the statute does not reasonably limit the class of criminal offenses which might reasonably be the subject of a "threat" pursuant to the statute to properly define the prohibited conduct.

[5] Holder's attorney argued (R.1150-51):

> As our briefs point out, your Honor, that particular section of the statute has been declared unconstitutional by a three Judge Court. In Landry vs. Daley, the judgment of that Court was reversed by the Supreme Court on the grounds that under Unger [*sic*] vs. Harris, which the Supreme Court had decided that day, that there was no one in the case who had the kind of injury, or potential injury, who had standing to raise the issue. And the

(Footnote continued on following page)

post trial motions, sentenced Holder to eighteen months probation, and fined him $1000 (RC.204).

IV.

THE APPELLATE COURT REVERSES HOLDER'S CONVICTION BECAUSE THE STATUTE IS UNCONSTITUTIONALLY OVERBROAD.

The appellate court found the rationale of *Landry v Daley* "persuasive authority" (App.D 4d) that § 12-6(a)(3) is overbroad and in conflict with the first amendment because it " 'prohibits threats of insubstantial evil' " while, at the same time, it impinges on " 'the public interest in giving legitimate political discussion wide berth' " (App.D 5d). The appellate court reversed the conviction without deciding other arguments raised by Holder (App.D 6d).

(Footnote continued from preceding page)

> Supreme Court adopted the doctrine under Unger [*sic*] that the issue concerning the constitutionality of a criminal statute should proceed through the State Courts.
>
> However, the ruling of Boyle vs. Landry, which was the name that the case took in the Supreme Court, the reasoning of the District Court and its judgment is still valid. To my research, neither the Illinois Supreme Court nor the Appellate Court have passed on the issue as to whether or not the (a)(3) Section is unconstitutional for vagueness and overbreadth.
>
> The import of that overbreadth is most significant in this case, because the crime of intimidation, as it is alleged here, arose in the context of a labor dispute, and arose in the context of what must be said to be, at best, an equivocal statement, to make the statement, the drums are not turning. And carrying the inference further, the drums will not turn until you sign this contract.

Presenting in a post trial motion and brief and having the prosecutor and Holder extensively argue before the trial court (R.1164-68, 1171-73) the overbreadth issue preserved it for appellate review. *People v Harrawood,* 66 Ill.App.3d 163, 167, 383 NE2d 707, 709 (1978); *People v Solheim,* 54 Ill.App.3d 379, 386, 369 NE2d 308, 314 (1977).

V.

THE SUPREME COURT OF ILLINOIS REVERSES THE APPELLATE COURT.

The Supreme Court of Illinois granted the State's petition for leave to appeal the overbreadth holding. Holder defended the appellate court's reversal of his conviction on grounds of overbreadth, vagueness, violation of the first amendment as applied to him, conflict with the supremacy clause, and independent state grounds, asserted in the courts below.[6]

After confirming Holder's standing to assert overbreadth (App.C 3c-4c), the supreme court, on the merits, acknowledged with respect to § 12-6(a)(3), first, that the gist of the offense is speech, and, second, that a person could be prosecuted for protected expression such as "threatening to picket in front of a city hall without a permit . . ., or threatening to distribute literature that is deemed 'offense' within the right-of-way limits of a State toll highway. . ." (App.C 8c). Nevertheless, the court held (App.C 4c-7c) that *Broadrick v Oklahoma,* 413 US 601 (1973), and *New York v Ferber,* 458 US 747 (1982), had sapped *Landry* of any purported vitality (App.C 6c) and support the conclusion "that the flaw in section 12-6(a)(3) is not a 'substantial concern' when viewed in the context of the legitimate sweep of an intimidation statute" (App.C 8c). It remanded the case to the appellate court for consideration of the other arguments raised by Holder with directions "to make a preliminary finding as to any labor law preemption question under the National Labor Relations Act (29 U.S.C. sec. 157)

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[6] Rule 318 of the Supreme Court of Illinois, ch.110A, ¶ 318, Ill. Rev. Stat. 1983, provides as relevant:

> (a) Relief to Other Parties. In all appeals, by whatever method, from the Appellate Court to the Supreme Court, any appellee, respondent, or co-party may seek and obtain any relief warranted by the record on appeal without having filed a separate petition for leave to appeal or notice of cross appeal or separate appeal.

that may arise in prosecuting this defendant under section 12-6(a)(3) of the Illinois intimidation statute" (App.C 8c).

Justices Goldenhersh and Simon dissented (App.C 9c-11c). They agreed with the majority's analysis of the holding by this Court in *Broadrick* and by the district court in *Landry*, but were "of the opinion that the rules were incorrectly applied to the facts in this case" (App.C 9c). After stating that "the offense of intimidation consists of speech, the communication of a threat", the dissenters read this Court's substantial overbreadth rule enunciated in *Broadrick* and *Ferber* to be "applicable only when conduct, and not merely speech, is involved" (App.C 9c). The dissenting opinion adopted the rationale of *Landry* (App.C 9c-10c), and concluded with this warning:

> Section 12-6(a)(3) is overbroad because it makes unlawful significant speech which is protected under the first amendment. The statute prohibits a threat of criminal action even though the threatened criminal act is neither imminent nor substantial. Moreover, the statute prohibits the threat even though there is no substantial likelihood that the criminal act will ever occur. In many situations the threatened criminal activity will not be imminent, substantial, and likely. As a result the statute, if continued to be regarded as valid, will silence much speech which is protected by the first amendment, for "persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression." (*Gooding v. Wilson* (1972), 405 U.S. 518, 521, 31 L. Ed. 2d 408, 413, 92 S. Ct. 1103, 1105.)

(App.C 10c-11c).

VI.

THE APPELLATE COURT AFFIRMS HOLDER'S CONVICTION.

On remand the appellate court rejected Holder's first amendment and supremacy clause arguments and affirmed his conviction.

The appellate court found that the felony conviction for intimidation rests on Holder's statement to the Employer's representative that "'the drums aren't turning until***'", which "indicates they [,the trucks,] were stationary and would not move unless the contract was signed" (App. A 7a). It held that his words were outside first amendment protection because "Holder was not interested in any form of discussion. His statements did not advocate a theory, but rather sought to coerce the employer to sign, or face as an alternative, the consequences" (App.A 4a).

The appellate court next held that Holder's statement was not "protected by the national labor policy" because the Union had not first bargained with the Employer "with the goal of reaching an agreement" (App.A 5a, 6a).

The appellate court then addressed the assertion that prosecuting Holder for his words, in the context in which they were spoken, was barred by principles of federal preemption[7] (App.A 9a). It stated that neither the prevention of intimidation, threats of violence and unlawful coercion which are compelling state interests nor the fact that Holder's words are arguably protected by the federal labor law is preempted by the national labor policy (App.A 10a-11a).

VII.

THE SUPREME COURT OF ILLINOIS REFUSES TO REVIEW THE APPELLATE COURT'S DECISION.

The supreme court denied Holder's petition for leave to appeal (App.B 1b). Justice Simon dissented based on a recent decision of the United States Court of Appeals for the Ninth Circuit holding void for overbreadth a provision of Montana's intimidation statute which is substantively identical to § 12-6(a)(3) (App.B 1b).

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[7] The appellate court erroneously stated that Holder "has not specifically" raised preemption (App.A 9a). See motion to dismiss the information, note 3, *supra*.

REASONS FOR GRANTING THE WRIT

I.

THE HOLDING OF THE SUPREME COURT OF ILLINOIS THAT SECTION 12-6(a)(3) IS NOT VOID FOR OVERBREADTH MISAPPLIES FIRST AMENDMENT PRINCIPLES ENUNCIATED BY THIS COURT AND CONFLICTS WITH A HOLDING OF THE NINTH CIRCUIT AND *LANDRY*.

Section 12-6(a)(3) regulates speech only and proscribes not only "evils within the allowable area of State control but. . . sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech", *Thornhill v Alabama*, 310 US 88, 97 (1940) (App.C 8c, 9c). Contrary to the majority opinion of the supreme court, subsection (a)(3) is void for overbreadth.

Broadrick v Oklahoma, relied upon by the supreme court, involved a state statute which regulated conduct only; i.e., a ban upon political activities by state employees. This Court made a clear distinction between the standard of strict scrutiny to be applied to statutes such as § 12-6(a)(3) which "seek to regulate 'only spoken words' ", 413 US at 612, and the lower standard for statutes such as the Oklahoma statute which affect only conduct, *id.* at 614-615. In holding that the Oklahoma statute was not facially overbroad, this Court first enunciated the substantial overbreadth doctrine: "the primary conduct which is affected by the law at issue must to a substantial extent be the kind of expressive and associational behavior which at least has a colorable claim to the protection of the amendment." Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844, 860 (1970). Not until *New York v Ferber* did this Court apply the substantial overbreadth doctrine beyond pure conduct. In the context of its facts, statute, issue, and reasoning—and contrary to the majority opinion of the supreme court—*Ferber* neither applied the substantial over-

breadth rule to all expression-regulating statutes nor dissipated the force of the holding in *Landry* that § 12-6(a)(3) is unconstitutionally overbroad.

Concerned with the serious national problem of "the exploitive use of children in the production of pornography," *Ferber*, 458 US at 749, the federal government and forty-seven states enacted statutes "specifically directed at the production of child pornography." *Ibid.* The New York statute "prohibited the dissemination of material depicting children engaged in sexual conduct regardless of whether the material is obscene." *Id.* at 749 n.2.

Paul Ferber operated adult bookstores. He was arrested for selling two films "devoted almost exclusively to depicting young boys masturbating." *Id.* at 752. Ferber was indicted under several provisions of Article 263 of the New York Penal Code, but convicted only on the two counts under § 263.15 which did not require proof that the films were obscene. *Ibid.* The New York Court of Appeals reversed the convictions holding, as relevant, § 263.15 "overbroad because it prohibited the distribution of materials produced outside the State, as well as materials, such as medical books and educational sources, which 'deal with adolescent sex in a realistic but nonobscene manner.' " *Id.* at 752-753.

This Court granted certiorari to decide a single and narrow issue[8] which "constitutes our first examination of a statute directed at and limited to depictions of sexual activity involving children." *Id.* at 753. This Court found that the statute sufficiently described a discrete class of materials which are not entitled to first amendment protection. *Id.* at 765. In deciding

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[8] "To prevent the abuse of children who are made to engage in sexual conduct for commercial purposes, could the New York State Legislature, consistent with the First Amendment, prohibit the dissemination of material which shows children engaged in sexual conduct, regardless of whether such material is obscene?"

New York v Ferber, 458 US 747, 753 (1982).

the overbreadth issue, this Court enunciated the narrow holding "that the rationale of Broadrick is sound and should be applied in the present context involving the harmful employment of children to make sexually explicit materials for distribution." *Id.* at 771. Considering the particular vice sought to be regulated and applying substantial overbreadth scrutiny to the statute tailored to regulate that vice, this Court unanimously sustained the facial validity of § 263.15. *Id.* at 773.

The only first amendment issues decided in *Ferber* were that the substantial overbreadth test is to be applied to a statute regulating expression which takes the form of hard core child pornography, and that the tightly drawn New York penal statute directed to hard core child pornography is not unconstitutionally broad. In the process, this Court made a clear distinction between statutes held invalid for overbreadth and § 263.15 of the New York Penal Code. The former were "sweeping . . . or . . . incapable of limitation," *id.* at 772, and, "unlike § 263.15, defined no central core of constitutionally regulable conduct; the entire scope of the laws was subject to the uncertainties and vagaries of prosecutorial discretion", citing cases involving statutes regulating expression where this Court did not apply "substantial" to the overbreadth doctrine. *Id.* at 771 n.26. Neither *Broadrick* nor *Ferber* establishes a blanket rule that the substantial overbreadth test must be applied to a statute, such as § 12-6(a)(3), which regulates pure speech.

In any event, § 12-6(a)(3) of the Illinois Criminal Code cannot pass constitutional muster using the substantial overbreadth test. Its restriction on speech, its sweeping nature, and its failure to define a central core of constitutionally regulable conduct place § 12-6(a)(3) in the class of statutes regulating speech which are incapable of limitation and in conflict with the first amendment.[9]

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[9] "Offense", as used in § 12-6(a)(3), is defined in the Illinois Criminal Code as "a violation of any penal statute of this State."

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> The content of the "substantial overbreadth" formula is filled in opinion by opinion. But at least it can be said that the reasoning of recent opinions calls in question a variety of laws which fail to specify circumstances under which proscribed conduct would in fact be both harmful and of little expressive value. Examples are laws punishing disorderly conduct, *delivery of threats, and incitement of illegality.*

Note, 83 Harv. L. Rev. at 923 (emphasis added).

In *Wurtz v Risley,* 719 F2d 1438 (9th Cir 1983), Wurtz was convicted of felony intimidation under § 45-5-203(1)(c)[10]

(Footnote continued from preceding page)

Ch.38, ¶ 2-12, Ill. Rev. Stat. 1983. To the list of forms of expression cited by the supreme court (App.C 8c, 9c-10c) which § 12-6(a)(3) & (b) sweeps into its felony net must be added some of the other vague, insubstantial or expression-chilling "offenses": "picket[ing] before or about the residence or dwelling of any person" except when used as a place of business, or picketing of his or her own residence or "premises commonly used to discuss subjects of general public interest" (ch.38, ¶ 21.1-2, Ill. Rev. Stat. 1983); "interference with a public institution of higher education" including, but not limited to, "use of one's person, individually or in concert with others, to impede access to or movement within *or otherwise to interfere with the conduct of the authorized activities of the public institution of higher education, its trustees, employees, students or invitees"* (ch.38, ¶¶ 21.2-2, 21.2-5, Ill. Rev. Stat. 1983; emphasis added); "mob action" which includes "[t]he assembly of 2 or more persons to do an unlawful act" (ch.38, ¶ 25-1(a)(2), Ill. Rev. Stat. 1983); criminal defamation: "with intent to defame another, living *or dead,* he communicates by *any* means to *any* person matter which *tends* to provoke a breach of the peace" (ch.38, ¶ 27-1, Ill. Rev. Stat. 1983; emphasis added); littering, which includes discarding objects on public property, allowing litter to accumulate upon real property to the point of "a public nuisance", abandoning a motor vehicle on public property or private property except your own (ch. 38, ¶¶ 86-1 *et seq.,* Ill. Rev. Stat. 1983); mutilation of a draft card (ch. 38, ¶ 90-11, Ill. Rev. Stat. 1983).

[10] Section 203 provides as relevant:

> Intimidation: (1) A person commits the offense of intimidation when, with the purpose to cause another to perform or

(Footnote continued on following page)

of the Montana Code which is substantively identical to § 12-6(a)(3) of the Illinois Criminal Code. After his claim that the statute is facially overbroad was rejected by the Supreme Court of Montana, *State v Wurtz*, 636 P.2d 246 (1981), Wurtz filed a habeas corpus petition in the United States District Court for Montana raising the overbreadth argument. The district court rejected his claim, but the Ninth Circuit reversed. The court of appeals found the Montana statute to be directed at expression, to be overbroad, and "the overbreadth to be real" and "substantial in relation to the statute's legitimate sweep". *Wurtz v Risley*, 719 F2d at 1441, 1442. The court of appeals observed that, although aware of *Broadrick* and *Landry*, the Montana Supreme Court did not cure the overbreadth "by judicial construction that narrows a statute's application largely to behavior unprotected by the first amendment."[11] *Id.* at 1442-43.

This Court should grant the petition in order to clarify the standard of scrutiny to be applied to a penal statute regulating speech, and to resolve the conflict between the Supreme Court

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> to omit the performance of any act, he communicates to another a threat to perform without lawful authority any of the following acts:
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> * * *
>
> (c) commit any criminal offense. . . .

Wurtz v Risley, 719 F2d 1438, 1439 (9th Cir 1983).

[11] In our case the State urged upon the supreme court two purported limiting constructions which it claimed would save the statute from overbreadth (Brief for State at 17). The supreme court did not adopt or discuss either assertion. However, in an earlier case involving an overbreadth challenge to a criminal statute regulating speech, the supreme court explicitly declined to supply an asserted limiting construction: "To adopt the State's position, it would be necessary to supply an additional provision to the otherwise clear and unambiguous language of [the section]. . . . This we cannot do." *People v Klick*, 66 Ill2d 269, 274, 362 NE2d 329, 331 (1977).

of Illinois on one hand and the Ninth Circuit and a district court on the other whether § 12-6(a)(3) is unconstitutionally overbroad.

II.

SUBSECTION (a)(3) IS UNCONSTITUTIONALLY VAGUE.

Neither the supreme court nor the appellate court directly passed on Holder's argument that § 12-6(a)(3) is unconstitutionally vague. The courts may have considered the overbreadth and vagueness arguments to be one and the same; i.e., in the area of first amendment analysis the vice of statutory vagueness is often indistinguishable from the vice of overbreadth. *See NAACP v Button,* 371 US 415, 433 (1963).

Cases which have confronted assertions of vagueness also reveal a "fair notice" mode of analysis; "A statute is fatally vague only when it exposes a potential actor to some risk or detriment without giving him fair warning of the nature of the proscribed conduct," *Rowan v United States Post Office,* 397 US 728, 740 (1970), "and because it encourages arbitrary and erratic arrests and convictions", *Papachristou v City of Jacksonville,* 405 US 156, 162 (1972). Certainly the phrases "without lawful authority" and "any criminal offense" used in § 12-6(a)(3) "themselves have no ascertainable meaning either inherent or historical." *Thornhill v Alabama,* 310 US at 100. Moreover, subsection (a)(3) lacks "[p]recision of regulation", *NAACP v Button,* 371 US at 438, because Holder could not have discerned the proscribed conduct within the four corners of the statute (App.C 8c, 9c-10c). Subsection (a)(3)'s delphic proscription, like "[t]he qualification 'without any lawful purpose or object'[,] may be a trap for innocent acts." *Papachristou v City of Jacksonville,* 405 US at 164. " 'It would

certainly be dangerous if the legislature [as here] could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large.' " *Id.* at 165. "Where the list of crimes is so all-inclusive and generalized", *id.* at 166, and,

> as here, there are no standards governing the exercise of the discretion granted by the [statute], the scheme [of § 12-6(a)(3)] permits and encourages an arbitrary and discriminatory enforcement of the law. It furnishes a convenient tool for "harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure."

Id. at 170.

III.

THE HOLDING BELOW THAT HOLDER'S WORDS LACK FIRST AMENDMENT PROTECTION BECAUSE THEY WERE INTENDED "TO COERCE THE EMPLOYER" TO SIGN THE COLLECTIVE BARGAINING AGREEMENT CONFLICTS WITH HOLDINGS OF THIS COURT.

The appellate court acknowledged that the first amendment protects " 'vituperative, abusive and inexact' " words uttered in the heat of a labor dispute, and found "some similarities" between the facts in this case and the "crude and offensive" words granted first amendment protection from criminal prosecution in *Watts v United States*, 394 US 705 (1969) (App.A 4a). It nevertheless held that Holder's words lost first amendment protection because he was "not interested in any form of discussion [with the Employer]. His statements did not advocate a theory, but rather sought to coerce the employer to sign, or face as an alternative, the consequences. In the present context the statements were designed to intimidate and coerce" (App.A 4a).

Holder's statement was designed to coerce the Employer in the sense that through the threat of a strike by the employees he sought to have the Employer recognize the Union and sign the collective bargaining agreement. However, decisions of this Court are clear that Holder cannot be made a felon for having spoken what and when he did. *See, e.g., NAACP v Claiborne Hardware Co.*, 458 US 886, 910 (1983) ("Speech does not lose its protected character, however, simply because it may embarrass others or coerce them into action."); *Organization for a Better Austin v Keefe*, 402 US 415, 419 (1971) ("The claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment."). Moreover, Holder was engaged in a constitutionally protected activity of disseminating information concerning the facts of the labor dispute. *See Thornhill v Alabama*, 310 US at 102-103.

The petition should be granted because this Court has always given special attention to a state's imposition of criminal liability in a case such as this one. "The fact that such activity is constitutionally protected, however, imposes a special obligation on this Court to examine critically the basis on which liability was imposed." *NAACP v Claiborne Hardware*, 458 US at 915 (fn.omitted).

IV.

THE HOLDING BELOW CONFLICTS WITH FEDERAL LABOR LAW PRINCIPLES ESTABLISHED BY THIS COURT.

A state's obligation to accord the fullest play to free expression in the course of a labor dispute arises not only from the first amendment but also "from the supremacy of federal labor law over inconsistent state regulation", *Letter Carriers Branch 496 v Austin*, 418 US 264, 282 (1974). Federal labor

law, in the form of the National Labor Relations Act (NLRA), explicitly protects the right to strike.[12]

Holder told the Employer that his employees were on strike.[13] The appellate court held that these words were not "protected by the national labor policy" because the Union had not first bargained with the Employer "with the goal of reaching an agreement" as required by §§ 8(d)[14] and

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[12] Section 13, 29 USC § 163, of the NLRA provides:

> Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

[13] Section 501 of the NLRA, 29 USC § 142, provides:

* * *

> (2) The term "strike" includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective-bargaining agreement) and any concerted slowdown or other concerted interruption of operations by employees.

The appellate court found Holder's statement to the Employer " 'that the drums aren't turning until' " to "indicate[ ] they [, the trucks,] were stationary and would not move unless the contract was signed" (App.A 6a). In other words, any alleged damage to the trucks which led to the charge of criminal damage to property could have been caused only by the drivers' concerted refusal to operate the trucks as stated by Holder (App.A 5a). Holder's words were therefore a statement that the drivers were engaged in a strike.

[14] Section 8(d), 29 USC § 158(d), provides as relevant:

> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel

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8(b)(3)[15] of the NLRA. The appellate court thereby created a bizarre rule of federal labor law that a union's purported commission of an unfair labor practice by threatening to strike without first having met its statutory bargaining duty constitutes felony intimidation. In doing so the appellate court totally misread and misapplied *NLRB v Insurance Agents Union,* 361 US 477 (1960) (App.A 5a-6a).

"The precise question" in *Insurance Agents* was whether, during bargaining for a contract, a union "refused to bargain collectively, thus violating . . . [§ 8(b)(3)], solely and simply because during the negotiations it seeks to put economic pressure on the employer to yield to its bargaining demands by sponsoring on-the-job conduct designed to interfere with the carrying on of the employer's business." 361 US at 479. This Court answered that the union had not violated the NLRA. The appellate court stated that this Court's answer was based on the fact that "[t]he [C]ourt found that the union had not breached its duty to bargain in good faith, and could use economic pressure and still be considered to have been bargaining in good faith" (App.A 5a). In the appellate court's view, *Insurance Agents* stated that the right to strike is limited to those instances where a union is meeting its duty under 8(d) of the NLRA. This Court however specifically stated that performance of the duty to bargain collectively is not a condition precedent to the employees' legitimate exercise of

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either party to agree to a proposal or require the making of a concession***.

[15] Section 8(b) of the NLRA, 29 USC § 158, provides as relevant:

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * *

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a);

their right to strike. Rather, "the two factors* * * exist side by side." *Id.* at 489. "The use of economic pressure, as we have indicated, is of itself not at all inconsistent with the duty of bargaining in good faith." *Id.* at 490-491.

> [T]he use of economic pressure by the parties to a labor dispute is not a grudging exception to some policy of completely academic discussion enjoined by the Act; it is part and parcel of the process of collective bargaining. * * * It may be that the tactics used here deserve condemnation, but this would not justify attempting to pour that condemnation into a vessel not designed to hold it.

Id. at 495-496 (fn.omitted).

The appellate court also claimed support for its unwarranted stricturing of the right to strike by quoting out of context from the concurring opinion of Justice Frankfurter in *Insurance Agents* (App.A 5a-6a). It is however beyond argument that the majority opinion in *Insurance Agents* did not agree that the law is what Justice Frankfurter in that case or the appellate court in this one wished it to be. "It is suggested here that the time has come for a re-evaluation of the basic content of collective bargaining as contemplated by the federal legislation. But that is for Congress". *Id.* at 500. Moreover, the appellate court ignored § 8(b)(7)[16] of the NLRA which specifically recognizes

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[16] Section 8(b), 29 USC § 158(b), of the NLRA makes it an unfair labor practice for a union or its agent:

> (7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:
>
> • • •
>
> (C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable

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the right of a union to engage in recognitional picketing; i.e., to strike before the duty to bargain arises.[17] *See NLRB v Teamsters Local 639,* 362 US 274, 291 (1960).

At the conclusion of its opinion, the appellate court dealt with the preemption issue (App.A 9a-11a). This Court has refused to apply the preemption doctrine "where the activity regulated was a merely peripheral concern of the Labor Management Relations Act . . . [or] touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." *San Diego Bldg Trades Council v Garmon,* 359 US 236, 243-244 (1959). The appellate court erroneously concluded that this case falls within both exceptions to the preemption doctrine, and, in the process, grossly distorted the national labor policy.

Relying on *Sears, Roebuck & Co. v San Diego Cty District Council of Carpenters,* 436 US 180 (1978), the appellate court held that "where the alleged misconduct of a union is only *arguably* protected under national labor law", the connection between the conduct and the concerns addressed in the NLRA is too attenuated to warrant application of the preemption

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period of time not to exceed thirty days from the commencement of such picketing * * *.

[17] "Recognitional" picketing is picketing designed to induce the employer to recognize the union as the exclusive bargaining agent although the union is not the employees' majority representative. *NLRB v Teamsters Local 639,* 362 US 274, 277 (1960). It has been referred to as organizing from the top and the picketing takes place, obviously, before the union represents a majority of the employees in an appropriate unit and before any bargaining can lawfully occur.

doctrine (App.A 10a). In the first place, Holder's expression was actually, rather than arguably, protected.[18] "[T]here is a constitutional objection to state-court interference with conduct actually protected by the Act." *Id.* at 199. In the second place, if Holder's words were arguably protected, only the Employer could have filed a § 8(b)(3) unfair labor practice charge to obtain from the Board a determination whether, as the appellate court found, the strike and the threat thereof were unprotected. *Sears* teaches that where, as here, the Employer who could have presented the protection issue to the Board has not done so and the Union has no acceptable means of doing so,[19] preemption is justified. *Cf. id.* at 202-203. Moreover, the appellate court was clearly wrong that "the intimidation charge is separable from the Federal issues that may exist here" (App.A 10a). The words criminalized in this case—the employees are on strike—and the timing of the words—before the Union's duty to bargain had supposedly been met—cannot be bifurcated between the state criminal law process and the Board without, as occurred here, potentially conflicting rules of law. The Board's § 8(b)(3) unfair labor practice proceeding would have focused, as did the criminal case, on the timing and nature of Holder's statement and the drivers' strike. Thus the prosecution of Holder and the drivers clearly interfered with the effective administration of the national labor policy. *See Operating Engineers Local 926 v Jones,* ____US ____, 75 L. Ed. 2d 368 (1983).

The appellate court announced a back-up position that Holder's expression falls within the local interests exception to

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[18] See text 22-26, *supra.*

[19] The appellate court turned the issue of access to the Board on its head when it stated that Holder "never presented" to the Board "the Federal issues that may exist here" (App.A 10a, 11a). Holder had no adequate means of obtaining an evaluation of the picketing by the Board. According to the appellate court, the Employer, not Holder, was threatened with economic consequences if the contract was not signed in violation of the Union's, not the Employer's, duty to first bargain in good faith.

the preemption doctrine; i.e., compelling state interests can arise "to enjoin violence, imminent threats to public order", and " 'intimidation and threats of violence' ", quoting from *Carmon*, 359 US at 249 (App.A 10a). However, Holder and the drivers were never charged with, let alone convicted of, violence, imminent threats to the public order, or threats of violence. The defendants were charged with conspiracy and intimidation for having told the Employer that the employees were on strike until the Employer signed the Union contract and criminal damage to property for the drivers engaging in a strike which allegedly caused the cement to harden in the drums. All defendants were acquitted of conspiracy *and* criminal damage to property, and *only* Holder was convicted for having told the Employer *exactly* what the drivers had agreed to and for which they were acquitted. Neither Holder's expression nor the drivers' conduct is of the type or degree for which this Court has carved out an exception to the preemption rule. *See Farmer v Carpenters Local 25*, 430 US 290, 299-300 (1977).

Unless reversed by this Court, workers and their majority representatives will be subject to criminal prosecution at the whim of a local prosecutor under a sweeping statute which criminalizes speech. Not only will constitutional expression and conduct be chilled, but the carefully crafted fabric of the national labor policy will be shredded.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 1984

APPENDIX A

Filed Nov. 3, 1983
Loren J. Strotz, Clerk
Appellate Court, 2nd District

No. 80-382

IN THE APPELLATE COURT OF ILLINOIS

Second District

PEOPLE OF THE STATE OF ILLINOIS,
Appellee,

v.

CARL HOLDER,
Defendant-Appellant.

Appeal from the 17th Judicial Circuit Court, Winnebago County, Illinois.

JUSTICE HOPF delivered the opinion of the court:

The defendant, Carl Holder, was found guilty of intimidation (Ill. Rev. Stat. 1979, ch. 38, par. 12-6) after a jury trial in the circuit court of Winnebago County. He was sentenced to 18 months' probation and fined $1,000. He appealed to this court and contested, *inter alia,* the constitutionality of the section of the intimidation statute under which he was charged. This court declared section 12-6(a)(3) of the Criminal Code of 1961 (Ill. Rev. Stat. 1979, ch. 38, par. 12-6(a)(3)) to be unconstitutionally overbroad and reversed Holder's conviction. (*People v. Holder* (1982), 103 Ill. App. 3d 353, 431 N.E.2d 427.) Subsequently the State appealed to the supreme court.

The State's petition for leave to appeal was granted by the supreme court and the finding of this court was reversed insofar

as we determined section 12-6(a)(3) of the Criminal Code of 1961 (Ill. Rev. Stat. 1979, ch. 38, par. 12-6(a)(3)) to be unconstitutionally overbroad. The cause was remanded to this court for consideration of the other issues raised by the parties. *People v. Holder* (1983), 96 Ill. 2d 444, 454, 451 N.E.2d 831.

The facts underlying this case have been described at length in previous opinions and only a summary will be presented here. In July of 1979 several cement truck drivers for the Rockford Redi-Mix Company, Inc. signed cards which authorized Carl Holder, the defendant, to act as their representative for purposes of collective bargaining. Holder was business representative for Teamsters Local 325. The drivers, dissatisfied with their wages and working conditions, arranged for Holder to present the authorization cards and a collective bargaining agreement to their employer, Rockford Redi-Mix.

The drivers made an agreement with Holder that they would report to work the following morning as scheduled, load their trucks with cement and proceed to a meeting spot on the way to their assigned job site. When the last truck left, the defendant, who would be parked near the plant, would enter the office and demand that the employer recognize the union and sign the union's contract. The defendant suggested that the drivers accompany him in presenting the contract, but the employees agreed to meet him after he had presented the Redi-Mix contract. The drivers hoped that Holder's unannounced appearance and presentation of the contract would provide them with sufficient leverage so that the union would be recognized and the contract signed.

At 7:45 in the morning of July 25, Holder and a union secretary entered the office of the general manager of Rockford Redi-Mix, Curt Countryman. Holder told Countryman they were from the union and represented a majority of his employees. According to Countryman, Holder told him that "the trucks that had just left are sitting down the road, and the drums aren't turning till I [Countryman] signed the contract."

Countryman looked through the contract but refused to sign it. Holder testified that he then said "Okay, sir, you've got a strike on your hands." Holder denied referring to the drums or the trucks.

The drivers and Holder then went to the job site at about 10:55 a.m. They contacted the employer by radio and left the message that they had arrived at the job site. The drivers then shut down the drums on their cement trucks. They indicated the drums had been turning up to this point. By the time an associate of Countryman's arrived at the job site the cement was hardened in some trucks, and there were no drivers present. There was a difference of opinion as to whether the cement could have hardened as quickly as the State's witnesses indicated. Countryman testified that it was necessary to replace one drum and jackhammer others to remove the hardened cement.

Holder and the drivers were charged, in an amended seven-count information, with the felonies of conspiracy, criminal damage to property and intimidation. The jury convicted Holder on one count of intimidation and acquitted him, and the drivers, on all other counts.

The defendant's initial contention on appeal was a challenge to the constitutionality of section 12-6(a)(3) of the Criminal Code of 1961. He contended it was overbroad and violative of his first amendment rights. The supreme court found that "the flaw in section 12-6(a)(3) is not a 'substantial concern' when viewed in the context of the legitimate sweep of an intimidation statute." (*People v. Holder* (1983), 96 Ill. 2d 444, 454, 451 N.E.2d 831, 835.) Thus, we turn to the remaining issues raised by Holder on appeal.

Holder contends on appeal that section 12-6(a)(3) of the Criminal Code of 1961 (Ill. Rev. Stat. 1979, ch. 38, par. 12-6(a)(3)) is unconstitutional as applied to him even if it is valid on its face. Defendant relies on the case of *Watts v. United States* (1969), 394 U.S. 705, 22 L. Ed. 2d 664, 89 S. Ct. 1399,

where the Supreme Court considered whether a statement made by an 18-year-old, in which he threatened to shoot the president if he was drafted and had to carry a rifle, was constitutionally protected. The court stated the statute prohibiting such threats on the president (18 U.S.C. sec. 871) requires that the government prove there was a threat. The court did not believe the "political hyperbole" indulged in by petitioner was such a threat. Rather, it stated, the language was a crude and offensive method of stating a political opposition to the president. While it is true that *Watts* bears some similarities to the facts of the case at bar, we believe it is fundamentally inapposite. In *Watts*, unlike the case at bar, the statements made were recognized as protected speech based on the principles that debate on public issues should be wide open and robust (394 U.S. 705, 708, 22 L. Ed. 2d 664, 667, 89 S. Ct. 1399). The court also recognized that speech in labor disputes can even be "vituperative, abusive and inexact." By contrast, in the instant case Holder was not interested in any form of discussion. His statements did not advocate a theory, but rather sought to coerce the employer to sign, or face as an alternative, the consequences. In the present context the statements were designed to intimidate and coerce. This is what the intimidation statute was intended to prohibit. We do not believe the statute is unconstitutional as applied.

We turn next to Holder's claim that his speech was protected under Federal labor law. While the federally created right to strike (29 U.S.C. 157) has been construed to protect abusive, intemperate or defamatory language which may otherwise be actionable (*National Association of Letter Carriers, AFL-CIO v. Austin* (1974), 418 U.S. 264, 41 L. Ed. 2d 745, 94 S. Ct. 2770), we believe the statement made by Holder, that the "drums aren't turning," was not within the umbrella of protection afforded by the Federal law.

Defendant concedes, for purposes of this appeal, that his conversation in the Redi-Mix office was as Countryman testified; *i.e.*, that he stated the drums were not going to turn unless

the contract was signed. The implication of this statement was that the concrete would harden in the trucks, and repairs to those truck [*sic*] would have to be made by the employer unless he signed the contract. Holder's position is that it was within his authority, as union representative, to make such a statement. We disagree. While Holder had clear authority to put economic pressure on the employer, he also had a duty to bargain collectively with the goal of reaching an agreement. (*N.L.R.B. v. Insurance Agents' International Union, AFL-CIO* (1960), 361 U.S. 477, 484, 4 L. Ed. 2d 454, 461, 80 S. Ct. 419.) While it is clearly not our role to ascertain if or when Holder violated his duty to bargain collectively, the cases which discuss that issue have significance in our determination of whether Holder's conduct was protected by Federal labor policy. In the above-cited *NLRB* case the employees engaged in harassing tactics which, the employer contended before the National Labor Relations Board (NLRB), amounted to a refusal to bargain collectively. The court found that the union had not breached its duty to bargain in good faith, and could use economic pressure and still be considered to have been bargaining in good faith. The case considered the scope of section 8(b)(3) of the National Labor Relations Act (NLRA) (29 U.S.C. 158(b)(3)), which makes it an unfair labor practice for a labor organization to refuse to bargain collectively with an employer. In discussing what types of conduct may be protected Justice Frankfurter stated in his separate opinion:

> "Moreover, conduct designed to exert and exerting 'economic pressure' may not have the shelter of § 8(b)(3) even in isolation. Unlawful violence, whether to person or livelihood, to secure acceptance of an offer, is as much a withdrawal of included statutory subjects from bargaining as the 'take it or leave it' attitude which the statute clearly condemns. One need not romanticize the community of interest between employers and employees, or be unmindful of the conflict between them, to recognize that utilization of what in one set of circumstances may only signify resort to the traditional weapons of labor may in another

> and relevant context offend the attitude toward bargaining commanded by the statute. Section 8(b)(3) is not a specific direction, but an expression of a governing viewpoint or policy to which, by the process of specific application, the Board and the courts must give concrete, not doctrinaire content." *NLRB v. Insurance Agents Union, AFL-CIO* (1960), 361 U.S. 477, 506, 4 L. Ed. 2d 454, 474, 80 S. Ct. 419.

Thus, under judicial interpretations of the NLRA, the right to strike is not an unqualified right. Further, we do not believe Holder's conduct in the instant case was protected by the national labor policy.

The defendant's next claim on appeal is that he was not proved guilty of intimidation beyond a reasonable doubt. He contends his statement was not a threat made without "lawful authority" under the statute. (Ill. Rev. Stat. 1979, ch. 38, par. 12-6(a)(3).) However, as previously discussed, we believe the statement concerning the drums not turning was not protected by the right to strike provisions of the NLRA. Thus, Holder exceeded his authority. Holder also urges his statement was not a threat. However, the record belies this assertion.

On appeal, Holder concedes that he entered Countryman's office and told Countryman the "drums aren't turning" unless Countryman signed the contract. Holder interprets this statement as meaning the employees were going on strike rather than that they intended to criminally damage the cement trucks. We believe the statement was an unequivocal threat by Holder, and there was ample evidence for the jury to have found that Holder intended to make Countryman sign the contract by threatening him with damaging the trucks which were parked down the road.

The gravamen of the offense of intimidation is the exercise of improper influence, the making of a threat with the intent to coerce another. (*People v. Hubble* (1980), 81 Ill. App. 3d 560, 401 N.E.2d 1282, 1285.) It has also been held that implicit in

the word "threat" as it is used in the intimidation statute, is the requirement "that the expression in its context have a reasonable tendency to create apprehension that its originator will act according to its tenor." (*People v. Gallo* (1973), 54 Ill. 2d 343, 352, 297 N.E.2d 569, quoting from *Landry v. Daley* (N.D. Ill. 1968), 280 F. Supp. 938, 961.) Holder contends that Countryman's response to the statement regarding the drums not turning was not one of apprehension. We believe Holder's statement did have the reasonable tendency to make one believe the truck would be damaged—in context, the statement "the drums aren't turning until * * *" indicates they were stationary and would not move unless the contract was signed. There was evidence that all concerned were aware that if the drums did not turn then the cement would harden, resulting in damage to the trucks. There was ample evidence that Holder had, and would, act according to the tenor of his threat. *Gallo* need not be interpreted to mean the State has the burden of showing Countryman's subjective response to Holder's statement. In context, the threat made was clearly one which would create apprehension. Holder's statement indicated an intent to act and had a reasonable tendency to coerce. (54 Ill. 2d 343, 353, 297 N.E.2d 569.) The State met its burden of proof beyond a reasonable doubt.

Holder also contends his conviction is inconsistent with the verdicts of acquittal rendered by the jury. Because the drivers were acquitted on all charges and Holder was acquitted on charges of conspiracy and damage to property, he urges that his communication did not constitute a threat to criminally damage the trucks. Holder contends that, where the jury found there was no agreement to communicate a threat of a crime, and there was no criminal damage to property, the verdicts are inconsistent.

While it could be argued that there is some logical inconsistency to being convicted of threatening to commit a crime and acquitted of the commission, we do not believe there is a legal inconsistency in the verdicts. The jury may have

believed that Holder had the intent to communicate a threat to commit a criminal act under 12-6(a)(3), but he did not succeed in carrying out the threat to damage the trucks. There was conflicting evidence concerning the extent of damage caused to the trucks. Viewed in this manner the verdicts are consistent, both legally and logically.

The rule in Illinois is that consistency in verdicts is not necessary. (*People v. Dawson* (1975), 60 Ill. 2d 278, 326 N.E.2d 755; *People v. Worsham* (1979), 79 Ill. App. 3d 1061, 1064, 398 N.E.2d 1068.) Further, legal inconsistency generally involves a situation where the essential elements of a crime are said to both exist and not exist at the same time. (*People v. Murray* (1975), 34 Ill. App. 3d 521, 340 N.E.2d 186.) Here, the elements of intimidation differ widely from the elements of conspiracy and criminal damage to property. It has been held that a conviction for intimidation is not legally inconsistent with the acquittal of the underlying charge. *People v. Hairston* (1970), 46 Ill. 2d 348, 361-62, 263 N.E.2d 840.

Holder also contends that he only said what the drivers told him to say, inferring he was not responsible for his own actions. Holder cites no authority for this line of reasoning and we believe it is without merit. We see no cause for reversal in this issue.

The next contention of error concerns the admission of certain evidence at trial. Holder contends he was prejudiced by the admission of the amount of monetary damages. While the State need not prove the exact amount of damages in a criminal damage to property case, it does have to prove the minimum amount necessary to justify a felony conviction. (*People v. Carraro* (1979), 77 Ill. 2d 75, 79-80, 394 N.E.2d 1194.) Thus, the evidence was properly allowed by the trial court.

Holder also contends that the State sought to prejudice him by referring to the "Central States, Southeast and Southwest Areas Pension Fund." The State urges that this reference was intended to show the complexity of the contract Holder had

presented for Countryman's signature. We see no basis for presuming that this evidence was prejudicial, or even if it was, it should warrant reversal.

Holder's first claim is that the jury was improperly instructed. He objected to Illinois Pattern Jury Instructions (IPI) Criminal, No. 2.01 (1968), given by the State. The instruction to the jury was given without modification, but Holder urges it should have been modified to add the word "felony" before the word "crimes." This, he urges, was necessary to let the jury know the seriousness of the offense. However, where an IPI instruction is applicable, it should be modified only where the facts make the uniform instruction inadequate. (*People v. Pates* (1980), 80 Ill. App. 3d 1062, 400 N.E. 2d 553, 556.) We see no prejudicial error in this regard.

Holder also claims he was prejudiced by the court's failure to allow certain of his instructions. However, these instructions would likely have only confused the jury inasmuch as they were argumentative, and this alone is sufficient reason to reject an instruction. Any non-IPI instruction given is required to be "simple, brief, impartial and free from argument." (73 Ill. 2d R. 451 (a).) The trial court properly refused these. We note that the jury was instructed that defendants had a right to strike and that a "strike" was defined. Holder's contention that the jury should have been further instructed about "self-help allowed as pressure in the bargaining process" was, we believe, too argumentative to be included in jury instructions.

There is no dispute that when certain union related activity is arguably subject to section 7 or section 8 of the NLRA (29 U.S.C. 157, 158) both State and Federal courts must defer to the NLRB. (*San Diego Building Trades Council v. Garmon* (1959), 359 U.S. 236, 3 L. Ed. 2d 775, 79 S. Ct. 773.) While defendant has not specifically challenged the jurisdiction of the State courts, the Illinois Supreme Court has directed that we "make a preliminary finding as to any labor law preemption question under the NLRA (29 U.S.C. sec. 157) that may arise

in prosecuting this defendant under section 12-6(a)(3) of the Illinois intimidation statute." *(People v. Holder* (1983), 96 Ill. 2d 444, 454, 451 N.E.2d 831.) The NLRA was designed to protect the rights of employees who choose to bargain collectively. However, Federal preemption is not total, and as the court recognized in *Garmon,* compelling State interests can arise that allow the states to enjoin violence and imminent threats to the public order. "[I]ntimidation and threats of violence" were specifically recognized as compelling State interests in *Garmon.* (359 U.S. 236, 249, 3 L. Ed. 2d 775, 785, 79 S. Ct. 733.) A compelling State interest has also been recognized in order to "deal with unlawful coercion which does not significantly conflict with the purposes of federal law." *(American Federation of Musicians v. Reno's Riverside Hotel, Inc.* (Nev. S. Ct. 1970), 475 P.2d 220, 222.) Similarly, we do not believe the NLRA preempts the State from enforcing the criminal provision in issue here. There is no public policy more important or more fundamental than that which favors the effective protection of the lives and property of citizens. *(Marbury v. Madison* (1803), 5 U.S. (1 Cranch) 137, 163, 2 L. Ed. 60, 69.) On a preliminary basis, we believe the intimidation charges in the instant case give rise to a compelling State interest which allow this court to consider the issues raised by the parties.

It has also been held that State jurisdiction is not preempted where the alleged misconduct of a union is only *arguably* protected under national labor law. In *Sears Roebuck & Co. v. San Diego County District Council of Carpenters* (1978), 436 U.S. 180, 56 L. Ed. 2d 209, 98 S. Ct. 1745, it was held that where the assertion of State jurisdiction did not create a significant risk of prohibition of protected union conduct, there was no reason to presume that the California State courts should be deprived of jurisdiction to entertain a trespass action brought by Sears for trespassory picketing. In the instant case, the intimidation charge is separable from the Federal issues that may exist here. It is quite possible that the State or Federal courts are the only forum in which Holder's claims could be

resolved. Further, Holder never presented the issue to the NLRB. See 437 U.S. 180, 202-03, 56 L. Ed. 2d 209, 98 S. Ct. 1745, 1760.

While the NLRA is a pervasive Federal scheme of regulation, we do not believe that its operation is inconsistent with State enforcement of a State criminal law in the instant case.

For the reasons stated, we are of the opinion that the judgment of the circuit court of Winnebago County be affirmed.

AFFIRMED.

SEIDENFELD, P.J., and VAN DEUSEN, J., concur.

APPENDIX B

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

January 31, 1984

Mr. Sherman Carmell
Carmell, Charone & Widner
39 S. LaSalle St., S#1110
Chicago, IL 60603

No. 59409— People State of Illinois, respondent, vs. Carl Holder, petitioner. Leave to appeal, Appellate Court, Second District.

The Supreme Court today *DENIED* the petition for leave leave [*sic*] to appeal in the above entitled cause.

Justice Seymour Simon Dissents: In view of the recent declaration by the United States Court of Appeals for the Ninth Circuit that Montana's intimidation statute is facially overbroad and violates the first amendment to the United States Constitution (*Wurtz v. Risley* (9th Cir. 1983), 34 Crim. L. Rep. 2201), I would allow Carl Holder's petition for leave to appeal and reverse his conviction on the ground that Illinois' nearly identical intimidation statute (Ill. Rev. Stat. 1981, ch. 38, par. 12-6(a)(3)) is also facially overbroad and unconstitutional. See *People v. Holder* (1983), 96 Ill. 2d. 444, 454 (Goldenhersh and Simon JJ., dissenting).

The mandate of this Court will issue to the Clerk of the Appellate Court on February 22, 1984.

APPENDIX C

Docket No. 56383—Agenda 9—November 1982.

THE PEOPLE OF THE STATE OF ILLINOIS, Appellant, v. CARL HOLDER, Appellee.

JUSTICE CLARK delivered the opinion of the court:

The defendant, Carl Holder, was convicted of intimidation under section 12—6 of the Criminal Code of 1961 (Ill. Rev. Stat. 1979, ch. 38, par. 12—6) at a jury trial in the circuit court of Winnebago County and sentenced to 18 months' probation and fined $1,000. The defendant appealed. The appellate court reversed the defendant's conviction in declaring section 12—6(a)(3) of the Code (Ill. Rev. Stat. 1979, ch. 38, par. 12—6(a)(3)) to be unconstitutionally overbroad. On May 28, 1982, this court granted the State's petition for leave to appeal from that judgment.

The circumstances of this case involve a labor dispute which arose during June and July of 1979 at the Rockford Redi-Mix Company, Inc., a Rockford corporation engaged in the business of delivering liquified cement by truck to local construction and commercial sites. Duane Countryman was the president of the company and his son Curtis L. Countryman was the general manager.

In June of 1979, several of the truck drivers employed by the Rockford Redi-Mix Company contacted the defendant, Carl Holder, who had worked for nine years as a business representative for Teamsters Local 325, to investigate the possibility of joining the union. The employees were dissatisfied with their wages and their working conditions.

The defendant advised the employees that there were two procedures available to them in seeking union recognition. Under the "long route," the drivers could petition the National Labor Relations Board for a representation election, a process which could take three or more months. Pursuant to the "short route," the drivers could sign cards authorizing the union to act as their collective-bargaining representative, whereupon the defendant could demand recognition from the company. The drivers chose the "short route" at a meeting on July 24, 1979, and signed authorization cards.

The defendant suggested that the drivers accompany him in presenting the authorization cards and contract to the company, but the drivers asked that the defendant go alone. The employees agreed at the meeting on the 24th that the following morning they would leave the employer's plant as scheduled and proceed to Genoa Road on the way to the Kirkland job site in De Kalb County. It was agreed that the employees would wait on Genoa Road while the defendant would enter the company's office and demand that the company recognize the union and sign the union's standard ready-mix contract. Holder would tell the employer that if the demands were not met the employees would strike. The employees hoped that Holder's unannounced appearance and threat of a strike with the trucks full of cement and scheduled for a pour at the Kirkland job site would be added leverage to have the employer recognize the union and sign the standard contract.

On July 25 at about 7:45 a.m., after the employees had left the plant, Holder and Russ Olson, the union's secretary-treasurer, entered the employer's office and found Curtis Countryman alone. According to Countryman, Holder said that he was from the Teamsters Union Local 325, that he represented the majority of the employees, that they had signed authorization cards, that the trucks had just left and were sitting down the road, and "that the drums aren't turning until I [Countryman] signed the contract." The defendant denied referring to the trucks or drums.

The defendant then laid a contract on Countryman's desk. Countryman said that he would have to read the contract. He thumbed through the pages and asked a question about article I of the contract. Countryman looked at the contract again and then indicated that he could not sign it. Holder testified that he then said, "okay, sir, you've got a strike on your hands."

Thereafter the defendant returned to the drivers and informed them that the contract would not be accepted. They proceeded to the Kirkland job site and advised the company office of their arrival by radio, but received no response. According to the drivers, the concrete in the drums had been agitating until this time; they stated that they then shut down the trucks, left the keys in the ignitions, and drove to the union office with the defendant and Olson.

Jim Prunty, an associate of Duane Countryman, testified that he arrived at the job site and found the cement hardened in the trucks' drums. Defense witnesses testified that the cement would not have hardened in that time and that Prunty could not have felt the hardened cement in the drum of one truck as Prunty had described. Witnesses for the defense testified that there simply was not enough time between the point at which the drums stopped turning and the point at which Mr. Prunty said that he felt the cement hardened for that cement to harden. Curtis Countryman stated that it was necessary to replace one of the drums and to jackhammer the others to remove the hardened cement.

Holder and the employees were charged in an amended seven-count information with the felonies of conspiracy, intimidation and criminal damage to property. The jury acquitted the drivers and convicted Holder on count II, intimidation, from which this appeal arose.

The defendant asserts that section 12—6(a)(3) of the Criminal Code of 1961 is overbroad and in conflict with the first amendment. Generally, a person to whom a statute may constitutionally be applied will not be permitted to challenge the statute on the ground that it could in another context be applied unconstitutionally to another party. (*United States v. Raines* (1960), 362 U.S. 17, 4 L. Ed. 2d 524, 80 S. Ct. 519.) However, the traditional rule of standing is not applicable when a party is asserting his first amendment rights. The validity of an overly broad statute may be contested "with no requirement that the person making the attack demonstrate that his own conduct could

not be regulated by a statute drawn with the requisite narrow specificity." *Dombrowski v. Pfister* (1965), 380 U.S. 479, 486, 14 L. Ed. 2d 22, 28, 85 S. Ct. 1116, 1121.

The defendant claims that section 12—6(a)(3) of the Code can be applied unconstitutionally in other contexts to other people that are legitimately exercising their first amendment rights. Holder can attack subsection (a)(3) on the grounds that it is overbroad under the first amendment without showing that his conduct is protected. (*Talsky v. Department of Registration & Education* (1977) 68 Ill. 2d 579, 590; *Gooding v. Wilson* (1972), 405 U.S. 518, 521-22, 31 L. Ed. 2d 408, 413-14, 92 S. Ct. 1103, 1105-06.) An exception is culled out from the general rule of standing in first amendment cases since application of that rule would "itself have an inhibitory effect on freedom of speech." (*United States v. Raines* (1960), 362 U.S. 17, 22, 4 L. Ed. 2d 524, 530, 80 S. Ct. 519, 523.) The rationale is to see that permissible speech is not inhibited. *Talsky v. Department of Registration & Education* (1977), 68 Ill. 2d 579, 590.

The defendant complains that section 12—6(a)(3) of the Code is overbroad because it makes it a criminal violation to engage in uninhibited discussion and effectively prohibits speech that is clearly protected by the first amendment.

Section 12—6(a)(3) of the Criminal Code of 1961, under which the defendant was convicted, provides:

> "A person commits intimidation when, with intent to cause another to perform or to omit the performance of any act, he communicates to another a threat to perform without lawful authority any of the following acts:
>
> * * *
>
> (3) Commit any criminal offense; ***." Ill. Rev. Stat. 1979, ch. 38, par. 12—6(a)(3).

In *Broadrick v. Oklahoma* (1973), 413 U.S. 601, 37 L. Ed. 2d 830, 93 S. Ct. 2908, the Supreme Court addressed an overbreadth attack on an Oklahoma statute that barred political activities by State employees. Oklahoma State employees were charged by the Oklahoma State Personnel Board with engaging in partisan political activities that included the solicitation of money for their superior. The court found that the overbreadth must be "substantial" be-

fore a statute regulating conduct will be invalidated on its face. In *Broadrick* the court recognized that the State, in attempting to maintain control over "harmful, constitutionally unprotected conduct," may, in wording a statute too broadly, "deter protected speech to some unknown extent" (413 U.S. 601, 615, 37 L. Ed. 2d 830, 842, 93 S. Ct. 2908, 2917) but concluded that "there comes a point where that effect *** cannot *** justify invalidating a statute on its face ***. To put the matter another way, particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." 413 U.S. 601, 615, 37 L. Ed. 2d 830, 842, 93 S. Ct. 2908, 2917-18.

In finding section 12—6(a)(3) to be overbroad on its face the appellate court buttressed its decision with a 1968 opinion of the Federal District Court for the Northern District of Illinois that examined an overbreadth attack on section 12—6(a)(3) in *Landry v. Daley* (N.D. Ill. 1968), 280 F. Supp. 938, *rev'd on other grounds sub. nom. Boyle v. Landry* (1971), 401 U.S. 77, 27 L. Ed. 2d 696, 91 S. Ct. 758. The *Landry* case involved a class action complaint that alleged that the officers of the city of Chicago or the officers of Cook County purposefully entered into a plan amongst themselves and other unknown persons to deprive the plaintiffs of constitutional rights as well as rights secured by the laws of the United States. The plaintiffs attacked section 12—6 of the Criminal Code of 1961 (Ill. Rev. Stat. 1967, ch. 38, par. 12—6), contending that it had a chilling effect on their exercise of first amendment rights, although none of the plaintiffs had at the time of the suit faced prosecution under the statute. The court in *Landry* said:

> "Sub-paragraph (a)(3) prohibits threats to 'commit any criminal offense.' The qualifying phrase, 'without lawful authority,' is redundant as applied to this sub-paragraph, since a criminal offense, by definition cannot be committed with lawful authority. The word 'offense' is defined in the Illinois Criminal Code as meaning 'a violation of any penal statute of this State.' [See Ill. Rev. Stat. 1967, ch.

38, par. 2—12.] Consequently, the sub-paragraph makes criminal threats to violate any Illinois statute imposing a penalty. The addition of the adjective 'criminal' does not narrow the meaning of this provision.

The provision is not vague. It is however, overbroad since it prohibits threats of insubstantial evil. The commission of criminal offenses against persons or property is a substantial evil, and the state may legitimately proscribe the making of threats to commit such offenses. The commission of offenses against public order *only*, however, is not such a substantial evil that the state may prohibit the threat of it. Sub-paragraph (a)(3) proscribes threats to violate *any* penal statute. It therefore makes criminal threats such as the following: (1) threats by dissentient [*sic*] groups to engage in disorderly conduct [see Ill. Rev. Stat. 1967, ch. 38, par. 26—1] threats by residents of a high-crime neighborhood to carry concealed weapons for their own protection [see Ill. Rev. Stat. 1967, ch. 38, par. 24—1(a)(4)] and threats by mothers to block a dangerous state highway to demonstrate the need for increased safety measures. [See Ill. Rev. Stat. 1957, ch. 95½, par. 197.] Indeed, the phrase 'commit any criminal offense' is so broad as to include threats to commit misdemeanors punishable by fine only. These evils are not so substantial that the state's interest in prohibiting the threat of them outweighs the public interest in giving legitimate political discussion a wide berth.

Since the language of sub-paragraph (a)(3) is an overbroad restriction on freedom of speech, it is invalid. Obviously, however, if the threat is carried out, the persons who violate the criminal law by their acts are subject to punishment. Therefore, we hold only that making it an offense to threaten to commit any crime, no matter how minor or insubstantial, is an unwarranted limitation." *Landry v. Daley* (N.D. Ill. 1968), 280 F. Supp. 938, 964 *rev'd on other grounds sub nom. Boyle v. Landry* (1971), 401 U.S. 77, 27 L. Ed. 2d 696, 91 S. Ct. 758.

However, the court's decision preceded *Broadrick*, where the Supreme Court held that the overbreadth of a statute must be real and substantial.

We believe the recent Supreme Court pronouncement in *New York v. Ferber* (1982), ___ U.S. ___, 73 L. Ed. 2d 1113, 102 S. Ct. 3348, supports upholding the statute at hand in an overbreadth attack. In *Ferber* the Supreme Court applied the substantial-overbreadth doctrine beyond conduct. The court indicated that the analysis employed was appropriate in a case that concerned itself with a serious national problem of "the exploitive use of children in the production of pornography." (___ U.S. ___, ___, 73 L. Ed. 2d 1113, 1117, 102 S. Ct. 3348, 3350.) In discussing whether the statute was overbroad because it would forbid the production and distribution of materials that fall within the orbit of the first amendment, the Supreme Court said that *Broadrick* "intimated [that] the requirement of substantial overbreadth extended 'at the very least' to cases involving conduct plus speech." The court then found "that the rationale of *Broadrick* is sound and should be applied in the present context involving the harmful employment of children to make sexually explicit materials for distribution."

The court then went on to the substantial-overbreadth test.

> "Applying these principles, section 263.15 is not substantially overbroad. We consider this the paradigmatic case of a state statute whose legitimate reach dwarfs its arguably impermissible applications. New York, as we have held, may constitutionally prohibit dissemination of material specified in section 263.15. While the reach of the statute is directed at the hard core of child pornograph, the Court of Appeals was understandably concerned that some protected expression, ranging from medical textbooks to pictorials in National Geographic would fall prey to the statute. How often, if ever, it may be necessary to employ children to engage in conduct clearly within the reach of the section 263.15 in order to produce educational, medical or artistic works cannot be known with certainty. Yet we seriously doubt, and it has not been suggested, that these arguably impermissible applications of the statute amount to more than a tiny fraction of materials within the statute's reach. Nor will we assume that the New York courts will widen the possibly invalid reach of the statute by giving an expansive construction to the proscription on 'lewd exhibition[s] of the

genitals.' Under these circumstances, section 263.15 is 'not substantially overbroad and whatever overbreadth exists should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied.' *Broadrick v. Oklahoma* [(1973), 413 U.S. 601, 615-16, 37 L. Ed. 2d 830, 842, 93 S. Ct. 2908, 2918.]" *New York v. Ferber* (1982), ___ U.S. ___, ___, 73 L. Ed. 2d 1113, 1133, 102 S. Ct. 3348, 3363.

While it is true that under section 12—6(a)(3) one could be prosecuted for threatening to picket in front of a city hall without a permit (Ill. Rev. Stat. 1979, ch. 38, par. 85—3), or threatening to distribute literature that is deemed "offensive" within the right-of-way limits of a State toll highway (Ill. Rev. Stat. 1979, ch. 121, par. 314a47½), we find that any such conceivable impermissible applications are dwarfed by the statute's legitimate reach in prohibiting threatened criminal activity.

The *Broadrick* court said that a statute would be declared to be overbroad on its face "only when the flaw is a substantial concern in the context of the statute as a whole." *Broadrick v. Oklahoma* (1973), 413 U.S. 601, 616 n.14, 37 L. Ed. 2d 830, 842 n.14, 93 S. Ct. 2908, 2918 n.14.

We feel that the flaw in section 12—6(a)(3) is not a "substantial concern" when viewed in the context of the legitimate sweep of an intimidation statute.

We therefore reverse the holding of the appellate court that section 12—6(a)(3) is overbroad on its face and therefore invalid.

Because the appellate court, in view of its holding, did not consider the other arguments raised by the parties, we now remand to the appellate court for a consideration of those issues. We further direct the appellate court to make a preliminary finding as to any labor law preemption question under the National Labor Relations Act (29 U.S.C. sec. 157) that may arise in prosecuting this defendant under section 12—6(a)(3) of the Illinois intimidation statute.

Reversed and remanded, with directions.

JUSTICE GOLDENHERSH, dissenting:

I dissent and would affirm the decision of the appellate court. I do not quarrel with the majority's analysis of the holding in *Broadrick v. Oklahoma* (1973), 413 U.S. 601, 37 L. Ed. 2d 830, 93 S. Ct. 2908, and *Landry v. Daley* (N.D. Ill. 1968), 280 F. Supp. 938, but I am of the opinion that the rules were incorrectly applied to the facts in this case. Section 12—6(a)(3) of the Criminal Code of 1961 provides in pertinent part:

> "A person commits intimidation when, with intent to cause another to perform or to omit the performance of any act, he communicates to another a threat to perform without lawful authority any of the following acts:
>
> * * *
>
> 3. Commit any criminal offense; ***." (Ill. Rev. Stat. 1979, ch. 38, par. 12—6(a)(3).)

The offense of intimidation consists of speech, the communication of a threat. It involves only speech because the conduct purportedly threatened, "any criminal offense," must of necessity be proscribed under another section of the Code.

In contrast, the statute upheld in *Broadrick* clearly involved action. It is clear that the limitation of overbreadth scrutiny applied in *Broadrick* is applicable only when conduct, and not merely speech, is involved. Thus, in *Broadrick* the Supreme Court upheld the validity of an Oklahoma statute involving restrictions on political campaign activity and in *New York v. Ferber* (1982), ___ U.S. ___, 73 L. Ed. 2d 1113, 102 S. Ct. 3348, held valid a New York statute prohibiting the knowing promotion of a sexual performance by a child under the age of 16 by distributing material which depicted the performance.

Section 12—6(a)(3) strikes at the heart of the political process by silencing those who in the furtherance of their political goals may advocate use of unlawful means. As pointed out by the appellate court, the statute here involved makes it "an offense to threaten to commit any crime, no matter how minor or insubstantial." (103 Ill. App. 3d 353, 357.) As the majority points out, it prohibits

people from threatening to picket in front of a city hall without a permit (Ill. Rev. Stat. 1979, ch. 38, par. 85—3) and from threatening to distribute literature that is deemed "offensive" within the right-of-way limits of a State toll highway (Ill. Rev. Stat. 1979, ch. 121, par. 314a47½). The statute would also prohibit people from threatening to commit misdemeanors and other "evils [which] are not so substantial that the state's interest in prohibiting the threat of them outweighs the public interest in giving legitimate political discussion a wide berth." *Landry v. Daley* (N.D. Ill. 1968), 280 F. Supp. 938, 964, *rev'd on other grounds sub. nom. Boyle v. Landry* (1971), 401 U.S. 77, 27 L. Ed. 2d 696, 91 S. Ct. 758.

The Supreme Court has long recognized that a fair and robust debate on issues of public importance can be guaranteed only if those who merely advocate criminal acts receive some protection agninst recrimination by the sovereign. The State may punish a citizen for advocating criminal acts only "where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio* (1969), 395 U.S. 444, 447, 23 L. Ed. 2d 430, 434, 89 S. Ct. 1827, 1829.

Section 12—6(a)(3) is overbroad because it makes unlawful significant speech which is protected under the first amendment. The statute prohibits a threat of criminal action even though the threatened criminal act is neither imminent nor substantial. Moreover, the statute prohibits the threat even though there is no substantial likelihood that the criminal act will ever occur. In many situations the threatened criminal activity will not be imminent, substantial, and likely. As a result the statute, if continued to be regarded as valid, will silence much speech which is protected by the first amendment, for "persons whose expres-

sion is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression." (*Gooding v. Wilson* (1972), 405 U.S. 518, 521, 31 L. Ed. 2d 408, 413, 92 S. Ct. 1103, 1105.) For this reason I would affirm the judgment of the appellate court, and declare the statute void under the overbreadth doctrine.

JUSTICE SIMON joins in this dissent.

APPENDIX D

Filed Jan. 27, 1982
Loren J. Strotz, Clerk
Appellate Court, 2nd District

No. 80-382

IN THE APPELLATE COURT OF ILLINOIS

Second District

PEOPLE OF THE STATE OF ILLINOIS,
Appellee,

v.

CARL HOLDER,
Defendant-Appellant.

Appeal from the Circuit Court of the 17th Judicial Circuit Winnebago County, Illinois

MR. JUSTICE HOPF delivered the opinion of the court:

Defendant, Carl Holder, was found guilty of intimidation, (Ill. Rev. Stat., 1979, ch. 38, par. 12-6) by a jury in Winnebago County. He was sentenced to 18 months probation and fined $1,000. Defendant appeals and contests, inter alia, the constitutionality of the intimidation statute.

The facts of this case are largely agreed upon between the parties. Five cement truck drivers for the Rockford Redi-Mix Company, Inc. were dissatisfied with their wages and working conditions and inquired into the possibility of joining the union. This led them to defendant Carl Holder, a business representative for Teamsters Local 325.

In June of 1979, one of the dissatisfied drivers met with Holder. Holder explained that there were two ways to join the

union. The long route required that the employees petition the National Labor Relations Board for a representation election. Holder told the driver that this could take three or more months to do.

Holder explained that the other way to join the union, or short route, was for the employees to sign cards authorizing the union to act as a workers' collective bargaining representative. After a majority of the employees signed the cards, Holder could demand recognition from the employer. If he was not given such recognition there would be a strike.

The driver reported back to his co-workers and another meeting was arranged. At this meeting all the employees attended and reviewed the standard Redi-Mix collective bargaining agreement. There was much concern among the employees that they would lose their jobs or be fired as a result of a strike. Holder suggested that they try and resolve their grievances directly with their employer.

In July of 1979, Holder was contacted and told that the drivers had no luck in talking with their employer. Holder explained the proceedings again and the drivers chose the short route. They signed the cards and arranged to have Holder go to the employer the next morning and present the proposed contract.

The drivers made an agreement with Holder that they would report to work the following morning, load their trucks with cement and proceed to a meeting spot on the way to their assigned job site. When the last truck left, Holder, who would be parked near the plant, would enter the office and demand that the employer recognize the union and sign the union's contract.

At 7:45 in the morning of July 25, Holder and a union secretary entered the office of the general manager of Rockford Redi-Mix, Curt Countryman. He told Countryman they were from the union and represented a majority of his employees. Holder told him that the trucks that had just left the plant were

sitting down the road and the drums would not be turning unless Countryman signed the contract. Holder then placed a contract on Countryman's desk and Countryman said he would have to look at it. After a few minutes he told Holder he would not sign the contract and Holder left.

Holder joined the drivers and Countryman was contacted by CB radio from where the drivers were waiting. One of the employees inquired on the CB radio if their representative had been to Countryman's office yet. He told Countryman that the drums would not turn until a contract was signed.

The drivers and Holder went to the job site at about 10:55 a.m. They contacted the employer by radio and left the message that they had arrived at the job site. This was the first time at which the drivers admitted to shutting down the drums on their cement trucks. They left the keys in the ignition of their trucks.

An associate of Countryman's arrived at the job site at about 11:15 a.m. He testified that the cement was hardened in the drums at that time. No drivers were present when he arrived. There was also testimony that the cement could not have hardened so quickly. Countryman testified that he had to replace one drum and had three others jackhammered to remove the hardened cement.

Holder and the drivers were charged by information with felony conspiracy, intimidation and criminal damage to property. Count I alleged that Holder's July 25th conversation with Curt Countryman in Countryman's office was the result of a conspiracy among the defendants to commit the offense of intimidation; i.e. to communicate a threat to the employer to criminally damage four redi-mix trucks "with the intent to cause Curtis L. Countryman to perform the act of signing an employment contract". Counts II and III charge the conversation violated sub-sections (a)(3) and (7), respectively, of the intimidation statute. Counts IV through VII charged all

defendants with criminal damage to the employer's four trucks by allowing the concrete to harden within the drum of each truck.

At the preliminary hearing the trial court found that there was lawful authority to strike and that, therefore, the counts regarding intimidation with the threat of bringing about a strike, under sub-heading (a)(7) of the statute in question here, was unfounded.

After a trial, the jury exonerated the drivers but Holder was convicted of violating sub-section (a)(3) of the intimidation statute, which provides:

> "A person commits intimidation when, with intent to cause another to perform or to omit the performance of any act, he communicates to another a threat to perform without lawful authority any of the following acts:
>
> * * *
>
> (3) commit any criminal offense;
>
> * * *."

Ill. Rev. Stat. 1979, ch. 38, par. 12-6(a)(3).

Defendant's first contention is that sub-section (a)(3) is unconstitutionally overbroad or vague. This statute was found to be overbroad by Judge Will of the U.S. District Court, Northern District of Illinois, in *Landry v. Daley* (N.D. Ill. 1967), 280 F. Supp. 938 (hereinafter *Landry*). This decision was reversed on other grounds by the Supreme Court in *Boyle v. Landry* (1971), 401 U.S. 77, 27 L.Ed. 2d 696, 91 S.Ct. 758, where it was found that the plaintiffs lacked standing to raise the issue of the constitutionality of the statute.

Because the Supreme Court did not reach the issue of the constitutionality of the intimidation statute, Judge Will's discussion of the issue remains as persuasive authority. Although we are not bound by it, we are nonetheless compelled by the reasoning set forth in *Landry* and do conclude sub-section (a)(3) of the intimidation statute is unconstitutional.

Judge Will found that sub-section (a)(3) was overbroad because it "prohibits threats of insubstantial evil". 280 F. Supp. 938, 964. He noted that sub-section (a)(3) could make criminal threats by dissentient groups to engage in disorderly conduct, or threats by mothers to block a dangerous state highway to demonstrate the need for increased safety measures. He stated that "indeed, the phrase 'commit any criminal offense' is so broad as to include threats to commit misdemeanors punishable by fine only. These evils are not so substantial that the state's interest in prohibiting the threat of them outweighs the public interest in giving legitimate political discussion wide berth." 280 F. Supp. 938, 964.

Freedom of speech has long been recognized as occupying a preferred position. (Murdock v. Pennsylvania (1943), 319 U.S. 105, 115, 87 L.Ed.1292, 63 S.Ct. 870.) It is not necessary that the record show us that Holder has engaged in privileged conduct. Rather, the mere fact that other applications of the statute in question, to other facts, can have impact on First Amendment rights is sufficient to invalidate the statute regardless of whether the defendant has engaged in privileged conduct. *N.A.A.C.P. v. Button* (1963), 371 U.S. 415.

An overbroad statute has been described as one that:

> "is designed to burden or punish activities which are not constitutionally protected, but the statute includes within its scope activities which are protected by the First Amendment. In a case of a statute which is overbroad on its face, the speaker's actions or speech may not be protected by the First Amendment and thus the act could have been prohibited under a carefully drawn statute. Nevertheless the Court will strike the overbroad statute because it might apply to others, not before the Court, who may engage in protected activity which the statute appears to outlaw."
>
> J. Nowak, R. Rotunda, J. Young, Constitutional Law, p. 722, (1978).

In *Landry*, Judge Will held that (a)(3) was overbroad because it could be enforced so as to encompass insignificant criminal threats or misdemeanors. We agree.

The state contends that the overbreadth doctrine has been reevaluated by the Supreme Court since *Landry* and the doctrine will now only be applied as a last resort (*Broadrick v. Ohio* (1973), 413 U.S. 601, 37 L.Ed.2d 830, 93 S.Ct. 2908). A specific test was set forth by the Court in *Broadrick*. It stated that a statute would be invalidated for overbreadth "only when the flaw is a substantial concern in the context of the statute as a whole." *Broadrick* 413 U.S. 601, 616 n.14.

We are of the opinion that when the *Broadrick* test is applied to the intimidation statute as a whole, (a)(3) is an overbroad restriction on freedom of speech and is invalid. As stated by Judge Will, if the threat is carried out then the persons who violate the criminal law by their acts are subject to punishment. However, to make it an offense to threaten to commit any crime, no matter how minor or insubstantial, is a substantial flaw in the statute. We make no finding with regard to the national policy on labor and are concerned only with whether (a)(3) is violative of the First Amendment.

Our decision should not be considered as a stamp of approval for the tactics employed by Holder or the drivers. Nor do we find that Holder's statement was protected by the federally created right to strike. *Letter Carrier Branch 496 v. Austin* (1974), 418 U.S. 264. 41 L. Ed. 2d 745, 94 S. Ct. 2770.

Because (a)(3) proscribes conduct that may be constitutionally protected we hold it invalid. We do not consider the other arguments raised by the parties. For these reasons the judgment of the circuit court is reversed.

REVERSED.

SEIDENFELD, P.J., VAN DEUSEN, J., concur.

UNITED STATES OF AMERICA

STATE OF ILLINOIS,
APPELLATE COURT, } ss.
SECOND DISTRICT,

I, LOREN J. STROTZ, *Clerk of the Appellate Court, in and for said Second Judicial District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true, full and complete copy of the Opinion of the said Appellate Court in the above entitled cause of record in my said office.*

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of the said Appellate Court, in Elgin, in said State, this 27th day of January, A.D. 1982.

LOREN J. STROTZ
Clerk Appellate Court,
Second District.